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IN THE

Supreme Court of the United States

BEVERLY R. GILL, *et al.*,

Appellants,

v.

WILLIAM WHITFORD, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

BRIEF OF *AMICI CURIAE* REPRESENT.US AND RICHARD PAINTER IN SUPPORT OF APPELLEES

SCOTT GREYTAK
REPRESENT.US
P.O. Box 60008
Florence, Massachusetts
01062
(413) 333-5650

ATARA MILLER
Counsel of Record
DANIEL M. PERRY
ALISON BONELLI
CONOR COLASURDO
TARYN GALLUP
ALEXANDRA PASLAWSKY
ERIK WILSON
MILBANK, TWEED, HADLEY
& MCCLOY LLP
28 Liberty Street
New York, New York 10005
(212) 530-5000
amiller@milbank.com

Counsel for Amici Curiae

275177

COUNSEL PRESS

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CASES:

Anderson v. Celebrezze,
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Buckley v. Valeo,
424 U.S. 1 (1976) 14

Cook v. Gralike,
531 U.S. 510 (2001) (Stevens, J.) 21

Davis v. Bandemer,
478 U.S. 109 (1986) 3

Gonzalez v. United States,
553 U.S. 242 (2008) 26

Khudaverdyan v. Holder,
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Kinsella v. Jaekle,
475 A.2d 243 (Conn. 1984) 24-25

The Ku Klux Cases,
110 U.S. 651 (1884) 20, 22

Cited Authorities

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League of United Latin Am. Citizens v. Perry,
548 U.S. 399 (2006) 13, 16

League of Women Voters v. Pennsylvania, et al.,
Civ. No. 261 MD 2017 (June 15, 2017) 5

Martinez v. Bush,
234 F. Supp. 2d 1275 (S.D. Fla. 2002) 4

McConnell v. FEC,
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McCutcheon v. Fed. Election Comm'n,
No. 12-536, 2013 WL 3874388 (2013) 17

Mistretta v. United States,
488 U.S. 361 (1989) 27

Newberry v. United States,
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Perez v. State,
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Regalado–Escobar v. Holder,
717 F.3d 724 (9th Cir. 2013) 13-14

Smiley v. Holm,
285 U.S. 355 (1932) 22

Cited Authorities

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U.S. Term Limits, Inc. v. Thornton,
514 U.S. 779 (1995) 21, 22

United States v. Classic,
313 U.S. 299 (1941) 20

United States v. Hatter,
532 U.S. 557 (2001) 27

Vieth v. Jubelirer,
541 U.S. 267 (2004) 3, 13, 21, 22

Whitford v. Gill,
218 F. Supp. 3d 837 (W.D. Wis. 2016) 13

STATUTES & OTHER AUTHORITIES:

B. A. Hinsdale, *American Government, National and State* (1895) 3, 20

Charles Doyle, Cong. Research Serv. 98-894 A, *Impeachment Grounds: Part 2: Selected Constitutional Convention Materials* 2-4 (1998) 24

Debates in the Federal Convention of 1787 as reported by James Madison, Documents Illustrative of the Formation of the Union of the American States, H.R. Doc. No. 398. ..... 15, 17-18

Cited Authorities

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Deschler-Brown Precedents, vol. 3, ch. 14, sec. 18 25

Federalist No. 10 16

Federalist No. 41 17

Federalist No. 63 18

Federalist No. 78 27

Federalist No. 79 27

G.A. Popock, *The Machiavellian Moment: Florentine Political Thought and The Atlantic Republican Tradition* 507 (1975). 16

John Adams, *A Defense of the Constitutions of Government of the United States of America*, 1787-1788 17

Jonathan Turley, *Good Behavior Clause*, in The Heritage Guide to the Constitution (Aug. 22, 2017) 26

Josh Hicks, *Md. Gerrymandering lawsuit could impact 2018 voting map*, The Washington Post (June 1, 2017). 12

Laura E. Little, *An Excursion into the Uncharted Waters of the Seventeenth Amendment*, 64 Temp. L. Rev. 629 (1991) 23

Cited Authorities

Page

Noah Webster, An American Dictionary of the English Language (1828) 14

Notes of the Secret Debates of the Federal Convention of 1787, Taken by the Late Hon. Robert Yates, Chief Justice of the State of New York, and One of the Delegates from That State to the Said Convention, H.R. Doc. No. 398 ..... 16-17, 18

Redistricting and Representation in the Great Lakes Region, Midwest Democracy Network (April 2013) 9

Redistricting in Massachusetts after the 2010 census, Ballotpedia 10

Rich Exner, *How gerrymandered Ohio congressional districts limit the influence of Ohio voters* 7

Richard A. Posner, *Law, Pragmatism, and Democracy* 245 (2003) 4

Robert J. Morgan, *Madison's Theory of Representation in the Tenth Federalist*, 36 J. Pol. 852 (1974) 16

Sabrina Eaton, *In evenly split Ohio, redistricting gives GOP 12-4 edge in congressional seats*, Cleveland.com (Nov. 11, 2012) 7

Cited Authorities

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Samuel Johnson, A Dictionary of the English Language (H.J. Todd ed. 1818) 14

U.S. Const. amend. XVII 2, 23

U.S. Const. art. I, § 4 19

U.S. Const. art. II, § 4 24

U.S. Const. art. III, § 1 26

Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 Geo. L.J. 1411 (2008) 16

Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341 (2009) 15

Zephyr Teachout, *Corruption in America: From Benjamin Franklin's Snuffbox to Citizens United* (2014) 15, 16

INTEREST OF THE *AMICI CURIAE*

Amicus curiae Represent.Us, is a non-partisan organization with more than 45 chapters nationwide that unites conservatives, progressives, and everyone in between to end political corruption.[1] Partisan gerrymandering is a critical piece of Represent.Us' broader policy suite, and as such, Represent.Us currently supports emerging ballot initiative efforts across the country that aim to end partisan gerrymandering on a statewide level. Represent.Us believes that extreme or excessive partisan gerrymandering will continue to undermine representative elections and foster corruption unless restrained by this Court.

Amicus curiae Richard Painter is the S. Walter Richey Professor of Corporate Law at the University of Minnesota Law School. He served as the chief ethics lawyer for President George W. Bush, as well as for White House employees and senior nominees to Senate-confirmed positions in the executive branch as Associate Counsel in the White House Counsel's office from 2005 to 2007. He believes that partisan gerrymandering undermines the system of participatory democracy envisioned by the original Tea Party and the Constitution's Framers.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have filed blanket consents to the filing of all amicus briefs in this matter.

SUMMARY OF THE ARGUMENT

Partisan gerrymandering has long been a part of the American political landscape, diluting the voting power of Republicans and Democrats alike. Today, more than ever, we witness increasingly effective manipulation of district lines by both major parties. While state-based efforts like the ballot initiative campaigns currently underway in Missouri and Utah (which Represent.Us actively support) have led to significant reforms in the past, the power to facilitate any truly transformative, comprehensive, and structural reform uniquely lies with this Court. Now this Court is presented with such an opportunity, and should act on it. Permitting state legislatures to abuse their political power in service of their own self-interest—and at the expense of the public good—rejects the Framers' vision of government embodied in the Constitution and illuminated by its history.

To be sure, extreme or excessive partisan gerrymandering amounts to the type of political corruption the Framers sought to prevent. Anti-corruption principles are an essential element of the Constitution's history and the Framers' intent. As history shows, the Framers were focused on weeding out corruption in the form of abuses of political power analogous to partisan gerrymandering. And reference to overlapping provisions in the Constitution—such as the Elections Clause, Impeachment Clause, and the Seventeenth Amendment—lends further support to the notion that the Constitution acts as a safeguard against corruption in the form of abuses of political power. This Court's dismissal of these firm anti-corruption principles will leave state legislatures, such as that in Wisconsin, free to dictate electoral outcomes and evade constitutional restraints.

ARGUMENT

A. Both Major Parties Engage In Partisan Gerrymandering, Which Harms Voters From Both Parties

This Court has defined partisan gerrymandering as "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power." *Ariz. State Legislature v. Ariz. Independent Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015).[2] For over three decades, this Court has recognized that victims of partisan gerrymandering may turn to the courts for relief, *see Davis v. Bandemer*, 478 U.S. 109 (1986), and in that time, it has not shied away from denouncing partisan gerrymandering's ill effects. For instance, in *Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004), this Court was clear that partisan gerrymandering is a significant problem that disrupts our constitutional order and "burdens rights of fair and effective representation." Similarly, in *Ariz. State Legislature*, 135 S. Ct. at 2658, partisan gerrymandering was deemed "incompatible[] with democratic principles." *See also Vieth*, 541 U.S. at 292; *id.* at 316 (Kennedy, J., concurring).

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2. Ironically, the man for who "gerrymandering" was named may have actually ***opposed*** the practice. *See* B. A. Hinsdale, *American Government, National and State* 196 (1895) ("Gerrymander. In humorous imitation of Salamander, from a fancied resemblance of this animal to a map of one of the districts formed in the redistricting of Massachusetts by the Legislature in 1811, when Elbridge Gerry was Governor. The districting was intended (it was believed, at the instigation of Gerry,) to secure unfairly the election of a majority of Democratic senators. It is now known, however, that he was opposed to the measure.") (quoting *The Century Dictionary*).

Despite these acknowledged threats, partisan gerrymandering persists and impacts both Republican and Democratic voters alike. *See Martinez v. Bush*, 234 F. Supp. 2d 1275, 1297 (S.D. Fla. 2002) ("This raw exercise of majority legislative power does not seem to be the best way of conducting a critical task like redistricting, but it does seem to be an unfortunate fact of political life around the country."); Richard A. Posner, *Law, Pragmatism, and Democracy* 245 (2003) ("although partisan gerrymandering is rife, the courts have done virtually nothing to control it"). Indeed, as the testimonials from the leaders of the Represent.Us chapters most affected by partisan gerrymandering indicate, voters in both "blue" and "red" states are harmed by partisan gerrymandering.[3]

In Wisconsin, Pennsylvania, and Ohio, for instance, Republican redistricting plans have left electoral outcomes heavily skewed in favor of Republicans at the expense of all other voters. The facts before the Court provide ample evidence of the ill-effects of gerrymandering in Wisconsin. As Jake Winkler, the former Represent Wisconsin chapter leader, states:

> In Wisconsin, . . . the enclaves of red and blue safe districts in this historically purple state deepen partisan divides by encouraging groupthink and one-sided elections. We forget

3. The leaders of the following chapters have expressed their support for this brief and the contents thereof: Represent Western Massachusetts (MA), Represent Boston (MA), Represent Central Pennsylvania (PA), Represent Northeastern Pennsylvania (PA), Represent Chicago (IL), Represent Lake County (IL), Represent McHenry County (IL), Represent Rockford (IL), Represent the DMV (DC, MD, VA).

> to have conversations and instead fling epithets of "liberal" and "conservative" like they are discussion-enders. In short, our elected representatives should more closely match the makeup of the electorate. Too much power residing in either party results in the party doubling down to consolidate power, and a prime example of that is the gerrymandering every time our districts are redrawn.

The results of partisan gerrymandering can also be seen in Pennsylvania. For instance, in 2012, Republican candidates in Pennsylvania won only 49% of the statewide congressional vote—and yet won 72% of Pennsylvania's congressional seats. In 2014 and 2016, Republican candidates retained the same 72% share of Pennsylvania's seats, even while winning only 55% and 54%, respectively, of the statewide vote. *See* Petition for Review, *League of Women Voters v. Pennsylvania, et al.*, Civ. No. 261 MD 2017 (June 15, 2017). Below are several testimonials from Pennsylvanians affected by partisan gerrymandering:

> *Peter Ouellette, Represent Northeastern Pennsylvania:*
>
> One of the results of partisan gerrymandering in Pennsylvania is that gridlock and partisanship in the General Assembly have become vividly apparent. Partisan bickering has led to the de-facto adoption of an out-of-balance state budget that was adopted without the Governor's signature. The legislature is apparently unable to come up with any solution to the revenue shortfall. Continued borrowing, raising one-time chunks of money, increased sales taxes,

and fracking taxes have been suggested, but cannot be agreed upon.... The result for Pennsylvanians is a state that simply does not work.... If reforms are not enacted, Pennsylvania will become a partisan war zone during the next redistricting process. Money and party operatives from outside our state will pour in to influence the outcome. The losers in this war will be the citizens of Pennsylvania. We will lose our sovereignty in the state, become further detached from our government, and even more disenfranchised. The importance of the U.S. Supreme Court decision cannot be overstated.

Michael Hodgson, Represent Central Pennsylvania:

I believe we need to end political gerrymandering by both parties, because it is a corrupt practice that undermines the sacred democratic principle of "One person, One vote." Political gerrymandering creates elected officials and their operatives who either have safe seats, or a strong desire to protect the status quo. Gerrymandering turns democracy on its head. People are supposed to pick those who represent them, but in Pennsylvania, our political leaders get to pick their voters. It is a huge conflict of interest, and, frankly, un-American, to let politicians be in charge of drawing the state and congressional districts. It is no different than letting the fox guard the hen house. Right now our country is deeply wounded by partisan politics and dysfunctional governing and various forms of political corruption. Democracy dies

> when the system of redistricting is rigged to favor the status quo, rather than the will of the people.
>
> *Nora Utech, Represent Northeast Pennsylvania*:
>
> When we allow politicians to draw their own district lines, we are giving them the power to undermine democracy. Not only are we taking away the power of the people, but we are also weakening the vote itself, causing constituents to become frustrated and disengaged. Voters often feel as though their vote is wasted, which in all reality, it often is.

The statewide congressional results in Ohio are similar: following redistricting in Ohio after the 2010 United States Census, no state congressional seat has changed party hands since 2012, and Republicans in the last three elections have claimed 75% of the statewide vote in House elections while only winning 56% of the overall vote.[4] The results of partisan gerrymandering deeply affect the citizens of Ohio:

> *Jacob Wagner, Represent Ohio*:
>
> I happen to live in perhaps the most absurdly gerrymandered Congressional District in the

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4. *See* Sabrina Eaton, *In evenly split Ohio, redistricting gives GOP 12-4 edge in congressional seats*, Cleveland.com (Nov. 11, 2012), http://www.cleveland.com/open/index.ssf/2012/11/in_evenly_split_ohio_redistric.html; *see also* Rich Exner, *How gerrymandered Ohio congressional districts limit the influence of Ohio voters*, Cleveland.com (posted March 7, 2017, updated Apr. 17, 2017), http://www.cleveland.com/datacentral/index.ssf/2017/03/gerrymeandering_sharply.html.

> country: Ohio's 9th, which is essentially a just barely contiguous Lake Erie beach stretching from Toledo to Cleveland. Prior to the 2010 census, the 9th District covered the area between Toledo and Lorain, while Cleveland resided in the 10th District. The 9th District was represented by Marcy Kaptur, while the 10th District was represented by Dennis Kucinich. Both Democrats were a formidable presence in Congress, representing their constituents ably and with great passion. When the Republican-dominated Ohio legislature redrew the state's districts after the 2010 Census, Kaptur and Kucinich were forced to face one another head on in the 2012 primary. It was painfully obvious to citizens throughout the new district that Republicans in the Statehouse had abused their sacred duty to dispose of a political foe. Kaptur won that 2012 primary after an ugly fight between former allies, and she won that November, too. She has won every election since, and she may as well have run unopposed each time. There is no such thing as a competitive Congressional District in Ohio on either side of the aisle; they have been gerrymandered into extinction.

By the same token, Republican voters in Illinois, Massachusetts, and Maryland have suffered at the hands of an entrenched Democratic state legislature. In Illinois, for instance, Democrats redrew congressional districts in ways that made it more difficult for Republican members, both incumbents and newcomers, to hold onto their House seats. In the 2012 elections, Democrats, who won only

55% of the votes, took 66% of the House seats.[5] This has frustrated voters, irrespective of party lines:

> *Elizabeth Lindquist, Represent Rockford:*
>
> I'm a progressive who lives in Illinois' 16th Congressional District. My district was gerrymandered by the Illinois Democrats to be over 60% Republican. It contains one-half of the closest metro area, Rockford, and one-half another nearby area, DeKalb. It stretches 180 miles from the Wisconsin border down around the Chicago suburbs to the Indiana border. Not only is it impossible to elect anyone other than an extreme Republican here, the geographic length of the district makes it extremely difficult to organize opposition to the representative. I am not represented by my representative in any meaningful way.
>
> *Robbie McBeath, Represent Chicago:*
>
> Illinois has certainly suffered as a result of partisan gerrymandering. Under Speaker of the Illinois House of Representatives Michael Madigan, who in 2017 became the longest-

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5. *See Redistricting and Representation in the Great Lakes Region*, Midwest Democracy Network (April 2013), at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=0ahUKEwj27Le86d7VAhUi3YMKHZknDdcQFgg-MAM&url=http%3A%2F%2Fwww.joycefdn.org%2Fassets%2Fimages%2FMDN_Redistricting_and_Representation_in_the_Midwest_FULL.pdf&usg=AFQjCNG4OyHEkQ_CCLf6-NhHYX_giUvHZQ.

> serving state House speaker in U.S. history, Illinois has gerrymandered its way to political gridlock, unable to adequately address urgent issues such as the state's unprecedented budget crisis. In 2016, the Illinois Supreme Court ruled against a redistricting referendum, leading to Republican Illinois Governor Bruce Rauner to say, "What drives people away from Illinois is the sense that our political system is broken and our government is unaccountable to the people.... Today's court decision to deny Illinoisans the right to vote on a redistricting referendum does nothing to stem the outflow or change people's views of how the system is rigged and corrupt." The result of political gerrymandering in Illinois is that voters are ultimately unable to fully exercise the power instilled in their right to vote, and because of their political affiliation, their voices are diminished before their representatives. Political gerrymandering is corruption, and it is hurting Illinois.

In Massachusetts, *all ten* House representatives in 2011 and 2012 were Democrats, after the 2010 census resulted in the loss of one seat.[6] As Vicki Elson, the chapter leader of Represent Western Massachusetts, and Cristian Morales, the chapter leader of Represent Boston state:

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6. *See Redistricting in Massachusetts after the 2010 census*, Ballotpedia, https://ballotpedia.org/Redistricting_in_Massachusetts_after_the_2010_census (last visited August 31, 2017).

Vicki Elson, Represent Western Massachusetts:

I am appalled that our democracy is seriously undermined by the unethical practice of partisan gerrymandering. There is no sensible rationale for allowing politicians to choose their voters, not the other way around. Districts should be drawn scientifically by nonpartisan experts to guarantee that every vote counts equally.

Cristian Morales, Represent Boston:

Massachusetts is the state which invented gerrymandering, and it uses it to ensure a Democratic super-majority in our State House; this unfair imbalance of power keeps our State House only 20% Republican even as our state electorate is 40% Republican. Almost every MA Democrat I've talked with has said that although they enjoy being on the "winning" side of gerrymandering, they would rather have a more democratic system in our state which truly represents all people. Massachusetts was established to be a "city on a hill," and hundreds of years later, Massachusetts residents still want to serve as that ideal example of self-governance. We recognize that gerrymandering in our state is preventing us from fulfilling this goal of ours, and now, we want to fix it.

And in Maryland, Democrats redrew the 6th Congressional District and in the process, changed its partisan make-up. Prior to 2011, Republicans represented

nearly 47% of eligible voters within that District, compared with about 36% for Democrats. After the redistricting, Republicans represented 33% of eligible voters in the district, compared with 44% for Democrats. This resulted in Democrats winning seven of Maryland's eight congressional seats.[7] Maryland voters have been discouraged by what they view as an abuse of power that denigrates the electoral process:

> *Alex Dubinsky, Represent the DMV:*
>
> Because of partisan gerrymandering, I know exactly how elections in Maryland are going to turn out. I think it is vital to get people registered to vote and encourage them to go to the polls, but how am I supposed to do that when I know it does not even matter? This ludicrous practice of gerrymandering across the country disgusts me. It disrupts the entire foundation that our country was founded on, one where people, not those in political office, are expected to be the ones that have the true power. Until gerrymandering is brought to a halt, I, along with people across the country, will not feel as if we have the voice that we are promised in what is supposed to be the greatest democracy in the world.

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7. *See* Josh Hicks, *Md. Gerrymandering lawsuit could impact 2018 voting map*, The Washington Post (June 1, 2017), https://www.washingtonpost.com/local/md-politics/md-gerrymandering-lawsuit-could-impact-2018-voting-map/2017/05/31/e1050080-461e-11e7-bcde-624ad94170ab_story.html?utm_term=.e76fe498a178.

B. Partisan Gerrymandering Is A Form Of Corruption

Nearly as troublesome as the fact that partisan gerrymandering is a persistent and bipartisan problem is that otherwise-conscientious legislators publicly brag of skewing election outcomes and rigging control of legislatures. *See Vieth*, 541 U.S. at 317 (Kennedy, J., concurring) (state legislators "have reached the point of declaring that, when it comes to apportionment: 'We are in the business of rigging elections.'"). This Court has acknowledged what these legislators seemingly fail to recognize: namely, that in extreme circumstances, partisan gerrymandering is "an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 456 (2006) (internal quotations and citations omitted); *Vieth*, 541 U.S. at 337 n. 30 (same); *cf. Whitford v. Gill*, 218 F. Supp. 3d 837, 886 (W.D. Wis. 2016) (the concept of "abuse of power" is at the "core of the Court's approach to partisan gerrymandering").

This abuse of power by state legislators in the form of extreme or excessive partisan gerrymandering is akin to corruption, as that concept is understood in its broader etymological and historic sense. In contemporary parlance, "corruption" is defined broadly as "the abuse of entrusted power for private gain." *See* https://www.transparency.org/what-is-corruption/#define (last visited August 20, 2017); *Khudaverdyan v. Holder*, 778 F.3d 1101, 1109 (9th Cir. 2015) (Owens, J. concurring) (internal quotations omitted) (the Department of Justice "correctly defines corruption as the abuse of entrusted power for personal gain."); *cf. Regalado–Escobar v. Holder*, 717 F.3d

724, 729–30 (9th Cir. 2013) ("Corruption broadly refers to an abuse of public trust."). This "private" or "political" gain need not be monetary. *Khudaverdyan*, 778 F.3d at 1108 n.5 ("Corruption means a lack of integrity and a use of a position of trust for dishonest gain, which need not be financial. One form of 'gain' is the maintenance of a position of authority.").

Both modern and historical dictionaries similarly define "corruption" broadly and in terms of a "loss of integrity" or "dishonest" behavior, untethered to financial gain. In fact, the definition of "corruption" has gone largely unchanged for over two centuries. *Compare* Merriam-Webster Dictionary (2016) (defining "corruption" as "dishonest or illegal behavior especially by powerful people (such as government officials or police officers)"); *with* Samuel Johnson, A Dictionary of the English Language (H.J. Todd ed. 1818) (defining corruption as, *inter alia*, "wickedness; perversion of principles; loss of integrity"); Noah Webster, An American Dictionary of the English Language (1828) (an unabridged dictionary) (defining corruption as, *inter alia*, "[d]epravity; wickedness; perversion or deterioration of moral principles; loss of purity or integrity").[8]

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8. This Court has also expressed concern about corruption in the context of its campaign finance jurisprudence, and has, at times, supported a broad definition of corruption in this context. *See, e.g., McConnell v. FEC*, 540 U.S. 93, 113 (2003) ("The prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits."); *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (upholding limitations on contributions and disclosure requirements because they served the governmental interests of limiting "corruption" and "the appearance of corruption"). This Court has held that "[j]ust as

C. In Drafting The Constitution, The Framers Were Concerned With Preventing Corruption

This broad definition of corruption is also firmly rooted in the Constitution's history. Although the specific issue of partisan gerrymandering was not a concern of the Framers, the debates during the Constitutional Convention, as well as statements made around the time of the Constitution's drafting, lend considerable support to the notion that the Framers were focused on preventing and weeding out corruption in the form of abuses of political power analogous to extreme partisan gerrymandering. *See* Debates in the Federal Convention of 1787 as reported by James Madison, Documents Illustrative of the Formation of the Union of the American States H.R. Doc. No. 398, at 288 (Aug. 14, 1787) ("corruption & mutability of the Legislative Councils of the States" is what "led to the appointment of [the] Convention" in the first instance.); *cf.* Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341, 353 (2009) (the Framers attempted to build "a bulwark against corruption" in the structure of the Constitution). Well aware that "because men are not always virtuous, structures must be enacted in order to discourage self-serving behavior[,]" Federalists and anti-Federalists alike concerned themselves with inoculating the new republic against the structural threats of political corruption. *See* Zephyr Teachout, *Corruption in America: From Benjamin Franklin's Snuffbox to Citizens United* (hereinafter "*Corruption in America*"), at 46 (2014).

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troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder." *McConnell*, 540 U.S. at 153.

As Professor Zephyr Teachout has observed, the Framers thought of "corruption" in reference to "situations in which a public officer or set of public officers were systematically using public resources for their own enrichment or advancement." Teachout, *Corruption in America* at 48. The Framers understood corruption as occurring when government officials behaved in a self-serving way to benefit themselves and their friends to the detriment of the public good. *See* Federalist No. 10, at 50-51 (James Madison); Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 Geo. L.J. 1411, 1437 (2008). For the Framers, corruption enabled the government to manipulate factions, protect itself from the electorate, and undermine the Constitution. *Id.* at 1437; *see* Robert J. Morgan, *Madison's Theory of Representation in the Tenth Federalist*, 36 J. Pol. 852, 868 (1974). This is precisely the evil this Court has warned against in its partisan gerrymandering jurisprudence. *See League of United Latin Am. Citizens*, 548 U.S. at 456 (partisan gerrymandering "evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good").

The Framers certainly considered corruption—in the broad sense of the word—to be one of the greatest threats to America's fledgling government. Indeed, as one historian has remarked, the Framers were "perpetually threatened" by corruption. G.A. Popock, *The Machiavellian Moment: Florentine Political Thought and The Atlantic Republican Tradition* 507 (1975); *see also* Notes of the Secret Debates of the Federal Convention of 1787, Taken by the Late Hon. Robert Yates, Chief Justice of the State of New York, and One of the Delegates from That State to the Said Convention, H.R. Doc. No. 398 at 392 (June 23,

1787) (noting George Mason's remark that "if we do not provide against corruption, our government will soon be at an end"). This obsession with, and focus on, corruption is apparent from the results of Professor Lawrence Lessig's comprehensive survey of the 325 uses of variants of "corruption" in constitutional debates: variants of the term "corrupt" were used 325 times in founding-era documents related to the Constitutional Convention, only five of which referred explicitly to *quid pro quo* bribery. *See* Brief of *Amicus Curiae* of Professor Lawrence Lessig in Support of Appellee at Appendix 1a, *McCutcheon v. Fed. Election Comm'n*, No. 12-536, 2013 WL 3874388 (2013).

Specifically, the Framers were concerned that corruption would permeate the electoral process. John Adams warned that "[c]orruption in elections is the greatest enemy of freedom." John Adams, *A Defense of the Constitutions of Government of the United States of America*, 1787-1788. For example, in advocating against short terms for members of the House, Hugh Williamson stated that "[i]f the Elections are too frequent, the best men will not undertake the service and those of an inferior character will be liable to be corrupted." Debates in the Federal Convention of 1787 as reported by James Madison, Documents Illustrative of the Formation of the Union of the American States, H.R. Doc. No. 398, at 59 (July 19, 1787); *but see* Federalist No. 41 (James Madison) (arguing the inverse by citing the seven year terms in the British House of Commons lead to a system "where the electors [were] so corrupted by the representatives, and the representatives so corrupted by the Crown").

The Framers also voiced particular concern that private interests could trample on public interests in

the Legislative Branch—exactly the intended effect of partisan gerrymandering. Pierce Butler warned of the British Parliament that "a man takes a seat in parliament to get an office for himself or friends, or both; and this is the great source from which flows its great venality and corruption." Notes of the Secret Debates of the Federal Convention of 1787, Taken by the Late Hon. Robert Yates, Chief Justice of the State of New York, and One of the Delegates from That State to the Said Convention, H.R. Doc. No. 398 at 379. And, in the words of Alexander Hamilton, the very structure of divided legislative power was designed specifically to prevent corruption:

> Before such a revolution can be effected, the Senate, it is to be observed, must in the first place corrupt itself; must next corrupt the State legislatures; must then corrupt the House of Representatives; and must finally corrupt the people at large. It is evident that the Senate must be first corrupted before it can attempt an establishment of tyranny. Without corrupting the State legislatures, it cannot prosecute the attempt, because the periodical change of members would otherwise regenerate the whole body. Without exerting the means of corruption with equal success on the House of Representatives, the opposition of that coequal branch of the government would inevitably defeat the attempt; and without corrupting the people themselves, a succession of new representatives would speedily restore all things to their pristine order.

See Federalist No. 63 (Alexander Hamilton).

D. The Text Of The Constitution Restricts Corruption In Government

As the above emphasizes, anti-corruption concerns—particularly with respect to those individuals elected to positions of power in the government—were a core focus of the Framers in drafting the Constitution. And as set forth below, these concerns resulted in distinct constitutional restrictions (and later, amendments) designed to combat corruption and limit governmental abuses of power. These constitutional restrictions provide additional support for this Court to uphold the Framers' intent by curtailing the corrupt practice of extreme or excessive partisan gerrymandering.

1. The Elections Clause

The Constitution's Elections Clause provides that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators. . . . " U.S. Const. art. I, § 4. A partisan gerrymander serves none of the historic functions of the Elections Clause, and instead attempts to do what this Court has expressly recognized as unconstitutional by dictating electoral outcomes and evading important constitutional restraints. Partisan gerrymandering does not (and cannot) fall within the proper scope of the states' delegated Elections Clause powers.

The very first act of Congress under the Elections Clause was to stamp out corrupt electoral schemes that

allowed the currently-dominant political party to stack the House of Representatives with members of its party. *See The Ku Klux Cases*, 110 U.S. 651, 660–61 (1884) (in 1842, Congress mandated the use of House electoral districts to eliminate the use of "general ticket" electoral systems because they "gave an undue preponderance of power to the political party which had a majority of votes in the state," and "worked injustice" on the electoral process).[9] In *The Ku Klux Cases*, the Court reemphasized Congress' power under the Elections Clause to combat corruption in congressional elections, and emphatically stated that corruption was one of the two greatest and most pervasive threats to our electoral system. *Id.* at 657–58 ("[A] government whose essential character is republican . . . must have the power to protect the elections on which its existence depends, from violence and corruption. If it has not this power, it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption.").

The Elections Clause is recognized by this Court as a source of congressional power to combat corruption. *See, e.g., Newberry v. United States*, 256 U.S. 232, 285, 288, 290 (1921) (Pintey, J., concurring) (the Elections Clause empowers Congress to regulate the time, place, and manner of election primaries to prevent "fraud, bribery, and corruption" and thus "safeguard the very foundation of the citadel"); *United States v. Classic*, 313 U.S. 299, 329 (1941) (Douglas, J., dissenting) ("any attempt to defile [a Congressional election] cannot be

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9. *See also* B. A. Hinsdale, *American Government, National and State* 195 (1895) (describing the use of "general ticket" and other electoral systems, and Congress' elimination of it).

viewed with equanimity"; acts that "corrupt the process of Congressional elections[] transcend mere local concern and extend a contaminating influence into the national domain.").

This Court's analysis of the Elections Clause in modern times, however, has shifted from Congress' power to the power of the state legislatures. As contemporary jurisprudence makes clear, the Elections Clause is meant to limit state legislatures' influence over the House. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 809 (1995) ("Nothing can be more evident than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy.") (quoting Alexander Hamilton). Indeed, the power to redraw congressional districts is derived directly and exclusively from the Elections Clause. *Vieth*, 541 U.S. at 275-76 (Scalia, J.) (Congress has plenary power over Congressional redistricting under the Election Clause); *Cook v. Gralike*, 531 U.S. 510, 522–23 (2001) (Stevens, J.) ("[T]he States may regulate the incidents of [Congressional] elections . . . only within the exclusive delegation of power under the Elections Clause."). Thus, if a redistricting practice is incompatible with the Elections Clause, it is *per se* unconstitutional. *See id.*

This analysis of the state legislature's power under the Elections Clause, however, retains its anti-corruption roots and hews closely to the original congressional mandate of preventing corruption in the electoral system and abuses of political power in the electoral process. In that spirit, this Court has repeatedly interpreted the state legislatures' delegated power to regulate the "manner" of

congressional elections as strictly limited to "evenhanded restrictions that protect the integrity and reliability of the electoral process," and that "prevent [the] distortion of the electoral process." *See Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983); *U.S. Term Limits*, 514 U.S. at 834–35 (collecting cases); *Smiley v. Holm*, 285 U.S. 355, 366 (1932) (the Elections Clause empowers states to "prevent[ ] corrupt [electoral] practices").[10]

In short, "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and ***not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints***." *U.S. Term Limits*, 514 U.S. at 833–34 (emphasis added). Yet this is exactly what partisan gerrymandering does, *see Vieth*, 541 U.S. at 317 (partisan gerrymandering is "the business of rigging elections"), and exactly what mandatory districting was designed to prevent. *See The Ku Klux Cases*, 110 U.S. at 660–61.

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10. The prevention of bribery ***and*** corruption underlies the Elections Clause. *See, e.g.*, *Newberry*, 256 U.S. at 285, 288 (noting that the Expulsion Clause—which allows each chamber of Congress to "expel a Member" upon a two-thirds vote—"is not an adequate check upon [Congressional] bribery, corruption, and other irregularities in the primary elections," and that a core principle of the Elections Clause is the prevention of this "fraud, bribery, and corruption"). Importantly, the Court recognizes ***both*** bribery and corruption individually, confirming that "corruption" under the Elections Clause is broader than *quid pro quo* bribery. *See id.*

2. The Seventeenth Amendment

Similarly, the Seventeenth Amendment, which establishes the election of Senators by the people, was explicitly premised on the fundamental distrust of corrupt state legislatures and political parties. Before the Seventeenth Amendment was ratified in 1913, all U.S. Senators were elected by state legislatures rather than direct popular vote. This system, however, led to such pervasive and entrenched corruption that the country was forced to wrest that power from the twin grasps of state legislatures and political parties via a constitutional amendment. *See, e.g.*, Laura E. Little, *An Excursion into the Uncharted Waters of the Seventeenth Amendment*, 64 Temp. L. Rev. 629, 640–41 (1991) ("The legislative history of the Seventeenth Amendment is replete with discussions of corruption, bribery, and inadequate representation. . . . [and] that these evils . . . were fostered by—and in fact were the direct product of—the process of selecting Senators by state legislatures"; "the Seventeenth Amendment was designed in part to wrest control of senatorial selection from powerful groups within political parties"; "direct election was to eradicate these evils, to act as a democratic vaccine to immunize the Senate from corrupt and ineffective representation").

The Seventeenth Amendment thus headed-off the Senate's electoral corruption problem by removing the ability of state legislatures and political parties to conspire to distort—and effectively control—the electoral process. Yet a functionally identical corruption problem still exists in elections for the House, as state legislatures and political parties continue to conspire to corrupt and distort the electoral process in decade-long increments through

partisan gerrymandering. Only by removing extreme and excessive partisan gerrymandering from their electoral arsenals can we similarly address the pervasive corruptions that continue to plague House elections.

3. The Impeachment, Good Behavior, And Compensation Clauses

The Constitution also guards against corruption in the form of abuses of power in both the Executive and Judicial branches. *First*, the Impeachment Clause provides that "[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. art. II, § 4. The inclusion of the word "[b]ribery" makes clear that the Framers were specifically concerned with corruption. But a broader concept of corruption was the Framers' animating concern: corruption was the first crime raised by the Framers as an impeachable offense. Charles Doyle, Cong. Research Serv. 98-894 A, *Impeachment Grounds: Part 2: Selected Constitutional Convention Materials* 2-4 (1998) ("corruption & some few other offenses . . . ought to be impeachable"). This was reflected in the first draft of the Impeachment Clause, which stated that the President "shall be removed from office on impeachment of . . . treason, bribery, ***or corruption***." *Id.* (emphasis added).

While "corruption" was eventually replaced by "other high Crimes and Misdemeanors," its focus in the Framers' debates, and inclusion in the Impeachment Clause's first draft, make clear that the Framers considered corruption to be different from—and broader in scope—than bribery. Other courts interpreting the Impeachment Clause have recognized this fact as well. *See Kinsella v. Jaekle*,

475 A.2d 243, 251-53 (Conn. 1984) (detailing history of Impeachment Clause and finding it based on a nearly identical seventeenth century "system chosen by [English] Parliament to remove corrupt or oppressive ministers").[11]

Courts have also interpreted the phrase "other high Crimes and Misdemeanors" as necessarily incorporating corruption broader than bribery—noting that the word "other" in the phrase "other high Crimes and Misdemeanors" denotes "criminal conduct which demonstrates ***the same type of moral corruption and dishonesty inherent in the specified offenses***" such as bribery. *Perez v. State*, 11 S.W.3d 218, 221 (Tex. Crim. App. 2000) (emphasis added). This makes sense, as bribery is a subset of corruption.

One of the few impeachments of a sitting federal judge under the Impeachments Clause confirms that not only corruption, but the mere appearance of corruption, is necessarily subsumed into the "other High Crimes and Misdemeanors" language of the Impeachment Clause. Judge Halsted Lockwood Ritter, District Court Judge for the Southern District of Florida, was impeached and removed from office for the high crime or misdemeanor of "general misbehavior and conduct that brought his court into scandal and disrepute." Deschler-Brown Precedents, vol. 3, ch. 14, sec. 18 at 2244; *id.* at 2229-32. Partisan gerrymandering is easily subsumed within these broader concepts of corruption as well: it is morally corrupt and dishonest for state legislatures to purposefully dilute certain constituents' votes because of their political

11. *See also supra*, fn. 10 (discussing this Court's recognition of the same in *Newberry*, 256 U.S. at 285, 288).

affiliation in an attempt to rig elections against them; and such practices bring scandal and disrepute upon Congress, the state legislatures, and both political parties.

Second, the Constitution also safeguards against corruption of the judiciary. The Good Behavior Clause notes that Article III "Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . ." U.S. Const. art. III, § 1. Interwoven with the Good Behavior Clause is the Compensation Clause, which provides that Article III judges "shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." *Id.* These two clauses combine to insulate Article III judges from corruption by the Executive and Legislative branches, while still providing for the impeachment and removal of corrupt judges. Notably, the Good Behavior Clause also protects against corruption by excising corrupt judges from the judiciary after impeachment. *See, e.g.*, Jonathan Turley, *Good Behavior Clause*, in The Heritage Guide to the Constitution (Aug. 22, 2017), http://www.heritage.org/constitution/#!/articles/3/essays/104/good-behavior-clause ("the Good Behavior Clause . . . reminds judges that life tenure is not a license for the wanton or the corrupt").

A core concern of the Framers when drafting Article III was to ensure judicial independence. *Gonzalez v. United States*, 553 U.S. 242, 268 (2008) (Thomas, J., dissenting) ("The Framers viewed independent judges, no less than the right to a jury of one's peers, as indispensable to a fair trial. For that reason, the Constitution affords Article III judges the structural protections of life tenure and salary protection.") (internal citation omitted). "[T]he Compensation Clause, along with the Clause

securing federal judges appointments 'during good Behavior,' . . . helps to guarantee what Alexander Hamilton called the 'complete independence of the courts of justice.'" *United States v. Hatter*, 532 U.S. 557, 567 (2001) (Breyer, J.) (quoting Federalist No. 78 at 466 (Alexander Hamilton)).

The Compensation Clause also provides an important limitation on the ability of the Legislature to corrupt judicial independence by threatening a judge's salary. *Id.* at 568 ("*[The] power over a man's subsistence amounts to a power over his will.* For this reason[,] [n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support.") (quoting Federalist No. 79 at 472 (Alexander Hamilton)). These twin protections also serve to protect the judiciary from the corrupting influence of the Executive branch. *See Mistretta v. United States*, 488 U.S. 361, 409–10 (1989) (Blackmun, J.) ("the President's power to appoint federal judges to [and remove said judges from] the [United States Sentencing] Commission" cannot "corrupt the integrity of the Judiciary" because any judge the President attempts to corrupt "would continue, absent impeachment, to enjoy tenure 'during good Behaviour' and a full judicial salary."). In short, preventing corruption, and the appearance of corruption, from public offices—regardless of its source or form—was and is a critical function of the Constitution. Partisan gerrymandering has breached the anti-corruption bulwarks of the Constitution, and it now falls to the judiciary to seal that breach.

* * *

Without a doubt, broad anti-corruption principles are core elements of the Constitution and its history, as

overlapping constitutional provisions were designed to serve as safeguards against political corruption in the form of abuses of power. These principles translate into a strong interest in eliminating corruption in politics and government, including in cases of extreme or excessive partisan gerrymandering.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below.

Respectfully submitted,

SCOTT GREYTAK
REPRESENT.US
P.O. Box 60008
Florence, Massachusetts
01062
(413) 333-5650

ATARA MILLER
Counsel of Record
DANIEL M. PERRY
ALISON BONELLI
CONOR COLASURDO
TARYN GALLUP
ALEXANDRA PASLAWSKY
ERIK WILSON
MILBANK, TWEED, HADLEY
& MCCLOY LLP
28 Liberty Street
New York, New York 10005
(212) 530-5000
amiller@milbank.com